

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KATHLEEN TONNEMACHER and  
DANIEL TONNEMACHER,

NO. 1:18-CV-3008-TOR

## Plaintiffs,

## ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

V.

JEREMI OSSMAN and THE  
PRUDENTIAL INSURANCE  
COMPANY OF AMERICA.

## Defendants.

BEFORE THE COURT are Defendant Prudential's Motion to Dismiss (ECF

No. 17), Defendant Ossman's Motion to Dismiss and Joinder in Prudential's

Motion to Dismiss (ECF No. 19), and Plaintiff's Status Report and Legal

## Objection to Defendant Report: Motion to have this Court Temporarily Protect

Kathleen's Assets (ECF No. 20). These matters were heard without oral argument,

the Court determined pursuant to LR 7.1(h)(3)(B)(iv) that oral argument is not

warranted. The Court has reviewed the record and files herein, and is fully

1 informed. For the reasons discussed below, Defendants' Motions to Dismiss (ECF  
2 Nos. 17; 19) are **GRANTED** and Plaintiffs' Second Request (ECF No. 20) is  
3 **DENIED as moot.**

4 **BACKGROUND**

5 On December 13, 2017, Plaintiffs Kathleen Tonnemacher and Daniel  
6 Tonnemacher, proceeding *pro se*, filed a Notice of Small Claim in the District  
7 Court of Kittitas County, Washington against Defendants Jeremi Ossman and  
8 Prudential Insurance Company of America. ECF No. 1. On January 17, 2018,  
9 Defendants removed the case to this Court pursuant to 28 U.S.C. § 1331 and 29  
10 U.S.C. § 1132(a)(2) of the Employee Retirement Income Security Act of 1974  
11 (ERISA). *Id.*

12 On February 12, 2018, Plaintiffs requested a hearing to argue venue and  
13 Defendants' affirmative defenses. ECF No. 5. Plaintiffs asserted that the case  
14 should proceed in state court and this Court has a conflict of interest due to a prior  
15 ruling in this matter. *Id.* at 2. On February 16, 2018, the Court denied Plaintiffs'  
16 request as these were not reasons which would defeat a properly removed case to  
17 federal court. ECF No. 6.

18 A telephonic scheduling conference was set for May 16, 2018, but Plaintiffs  
19 failed to appear and the Court held an ex parte hearing where it discussed a Motion  
20 to Dismiss briefing schedule. ECF No. 11. The Court instructed Defendants to file

1 a Motion to Dismiss within 35 days of the date of the Order. *Id.* at 1. On May 17,  
2 2018, Plaintiffs filed an Emergency Hearing Request. ECF No. 12. On May 29,  
3 2018, Plaintiffs filed a status report and request to have this Court temporarily  
4 protect Kathleen Tonnemacher's assets. ECF No. 13. On June 14, 2018, the Court  
5 denied both of Plaintiff's motions. ECF No. 16.

6 On June 20, 2018, Defendants each filed a Motion to Dismiss. ECF Nos.  
7 17; 19. On June 27, 2018, Plaintiffs filed a second request to have Kathleen  
8 Tonnemacher's money returned to her and requested a hearing in open court. ECF  
9 No. 20. On July 11, 2018, Prudential filed an Objection and Opposition to Plaintiff  
10 Daniel Tonnemacher's Motion at ECF No 20. ECF No. 21. On July 12, 2018,  
11 Plaintiffs filed an interlocutory appeal to the Ninth Circuit. ECF No. 22.

12 Plaintiffs failed to timely respond to Defendants' Motions to Dismiss. *See*  
13 LR 7.1(b)(2)(B). Failure to comply with the requirements of LR 7.1(b) "may be  
14 deemed consent to the entry of an Order adverse to the party who violates these  
15 rules." LR 7.1(d). The Court will now consider the merit of Defendants' Motions  
16 to Dismiss. ECF Nos. 17; 19.

## 17 FACTS

18 The following facts are drawn from Plaintiffs' Notice of Small Claim and  
19 are accepted as true for the purposes of the instant Motions to Dismiss. Plaintiffs  
20

1 allege that in or about the summer of 2016, Ms. Ossman,<sup>1</sup> her lawyer Brent  
2 Featherston, and Prudential conspired to “steal” four months of pension benefits  
3 from Kathleen Tonnemacher’s account at Prudential. ECF No. 1 at 10 (Ex. A).  
4 These payments were from April to July, totaling \$4,000. *Id.* Plaintiffs insist that  
5 Ms. Ossman or her attorney lied to Prudential when they told Prudential that they  
6 had the authority to seize the money and put it out of Kathleen Tonnemacher’s  
7 control. *Id.* Kathleen Tonnemacher is 93 years old at the time of the filing of the  
8 Complaint and a ward of the state. *Id.* She is also making the claim that  
9 Defendants committed felony elder abuse, kidnapping, and grand theft. *Id.*

10 **DISCUSSION**

11 **I. Motions to Dismiss**

12 **A. Standard of Review**

13 “After the pleadings are closed—but early enough not to delay trial—a party  
14 may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). In reviewing a  
15 12(c) motion, the court “must accept all factual allegations in the complaint as true  
16 and construe them in the light most favorable to the non-moving party.” *Fleming*  
17 *v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). “A judgment on the pleadings is

18  
19 

---

<sup>1</sup> Ms. Ossman is a state court-appointed conservator of Kathleen  
20 Tonnemacher’s assets. ECF Nos. 17 at 1-2; 17-2 (Ex. 2); 19 at 1.

1 properly granted when, taking all the allegations in the non-moving party's  
2 pleadings as true, the moving party is entitled to judgment as a matter of law."

3 *Marshall Naify Revocable Trust v. United States*, 672 F.3d 620, 623 (9th Cir.  
4 2012) (quoting *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)).  
5 "Analysis under Rule 12(c) is substantially identical to analysis under Rule  
6 12(b)(6) because, under both rules, a court must determine whether the facts  
7 alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy."  
8 *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (internal quotation  
9 marks and citation omitted).

10 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may  
11 move to dismiss the complaint for "failure to state a claim upon which relief can be  
12 granted." Fed. R. of Civ. P. 12(b)(6). To survive dismissal, a plaintiff must allege  
13 "sufficient factual matter, accepted as true, to 'state a claim to relief that is  
14 plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell  
15 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This requires the plaintiff to  
16 provide "more than labels and conclusions, and a formulaic recitation of the  
17 elements." *Twombly*, 550 U.S. at 555. When deciding, the court may consider the  
18 plaintiff's allegations and any "materials incorporated into the complaint by  
19 reference." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061  
20 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,

1 322 (2007)). A plaintiff’s “allegations of material fact are taken as true and  
2 construed in the light most favorable to the plaintiff[,]” but “conclusory allegations  
3 of law and unwarranted inferences are insufficient to defeat a motion to dismiss for  
4 failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir.  
5 1996) (citation and brackets omitted).

6 **B. Standing**

7 To establish standing, a plaintiff must allege: (1) an “injury in fact”; (2) a  
8 causal connection between the injury and conduct complained of; and (3) a likely,  
9 as opposed to merely speculative, injury that will be redressed by a favorable  
10 decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).  
11 An injury in fact is defined as “an invasion of a legally protected interest which is  
12 (a) concrete and particularized; and (b) actual or imminent, not conjectural or  
13 hypothetical.” *Id.* (internal quotation marks and citations omitted).

14 Prudential alleges that Mr. Tonnemacher lacks standing because he is not a  
15 Plan participant nor is he a beneficiary of any Plan benefits. ECF No. 17 at 5.  
16 Prudential emphasizes that nowhere in the Complaint is there an allegation that Mr.  
17 Tonnemacher has any personal entitlement or legal interest in the accounts at issue.  
18 *Id.* Mr. Tonnemacher also did not provide any proof that he was appointed as  
19 guardian, attorney-in-fact, or other legal representative of Kathleen Tonnemacher.  
20 *Id.* Mr. Tonnemacher does not allege that he has any right to Kathleen

1 Tonnemacher's accounts or that he was personally injured as a result of the alleged  
2 acts. *Id.* at 6.

3 Ms. Ossman agrees with Prudential's argument, alleging that Mr.  
4 Tonnemacher has no legal right, title, or interest in the Prudential account. ECF  
5 No. 19 at 3. Ms. Ossman insists that Mr. Tonnemacher has attempted to thwart her  
6 authority by filing bankruptcy in the United States Bankruptcy Court in the District  
7 of Idaho and in the Eastern District of Washington. *Id.* Ms. Ossman emphasizes  
8 that the Idaho Magistrate Court determined Kathleen Tonnemacher was  
9 incapacitated or otherwise qualified for the appointment of a conservator and no  
10 authority was conferred upon Mr. Tonnemacher. *Id.* at 3-4.

11 The Court finds that Mr. Tonnemacher is unable to establish standing  
12 because he has no legally protected interest and thus cannot establish an injury in  
13 fact. Mr. Tonnemacher has no claim in Kathleen Tonnemacher's assets or her  
14 Prudential Plan, meaning that he has no legally protected interest. Accordingly,  
15 the Court finds Mr. Tonnemacher lacks standing to assert any claims regarding  
16 Kathleen Tonnemacher's assets.

17 **C. Kathleen Tonnemacher's Participation**

18 Prudential asserts that Kathleen has not been an active participant since the  
19 inception of this case. ECF No. 17 at 6. Some of Plaintiffs' submissions to the  
20 Court were purportedly initialed by Kathleen Tonnemacher (ECF Nos. 1 at 9; 12;

1 15), others were not even initialed (ECF No. 13). ECF No. 17 at 6. Prudential  
2 emphasizes that none of the submissions were signed. *Id.* Prudential argues that it  
3 is clear from reading Plaintiffs' submissions that Mr. Tonnemacher is the sole  
4 author of those documents. *Id.* Kathleen Tonnemacher also did not participate in  
5 the April 25, 2018 Rule 26 telephonic meet and confer with Defendants' attorneys.  
6 *Id.* at 7.

7 Additionally, Prudential insists that a legally incapacitated person in need of  
8 protection is not competent to provide informed consent, make decisions on her  
9 own behalf, or otherwise act in her own interests. *Id.* Kathleen Tonnemacher then  
10 lacks capacity to bring this action without a representative, guardian ad litem, or  
11 "next friend" acting on her behalf. ECF No. 17 at 7; Fed. R. Civ. P. 17(c)(1)-(2).

12 Ms. Ossman argues that Mr. Tonnemacher "unilaterally and singularly has  
13 filed this action." ECF No. 19 at 4. Ms. Ossman asserts that if any portion of the  
14 Complaint is signed or initialed by Kathleen Tonnemacher, it was done so at a time  
15 when she was determined to be incapacitated by the 2016 state court orders. *Id.*

16 The Court finds that Kathleen Tonnemacher likely has not participated in  
17 this action and she does not have the capacity to bring this suit. The Court  
18 emphasizes that Kathleen Tonnemacher has failed to sign any of the pleadings.  
19 Kathleen Tonnemacher is also legally incapacitated and Mr. Tonnemacher does not  
20

1 allege that he is a guardian, conservator, fiduciary, or “next friend” who can sue in  
2 her name. Fed. R. Civ. P. 17(c)(1)-(2).

3 Accordingly, the Court dismisses Plaintiffs’ claims as Mr. Tonnemacher  
4 lacks standing and Kathleen Tonnemacher lacks the capacity to sue. The Court  
5 need not address Defendants’ valid arguments regarding the *Rooker-Feldman*  
6 Doctrine. ECF Nos. 17 at 8-10; 19 at 4.

7 The Court also notes that while improper service could be cured, Plaintiffs  
8 failed to properly serve both Defendants. ECF Nos. 17 at 10-11; 19 at 5; *see also*  
9 Fed. R. Civ. P. 4. Plaintiffs merely provided a copy of the Notice of Small Claim  
10 to Prudential’s New York counsel’s office who has not agreed to accept service.  
11 ECF No. 17 at 11. Plaintiffs mailed the Notice of Small Claims to Ms. Ossman.  
12 ECF No. 19 at 5. The Court then also dismisses Plaintiffs’ Complaint pursuant to  
13 Federal Rule of Civil Procedure 12(b)(5).

14 **D. Leave to Amend**

15 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend a  
16 party’s pleading “should [be] freely give[n] . . . when justice so requires,” because  
17 the purpose of the rule is “to facilitate decision on the merits, rather than on the  
18 pleadings or technicalities.” *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir.  
19 2015) (citation omitted). “[A] district court should grant leave to amend even if no  
20 request to amend the pleading was made, unless it determines that the pleading

1 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203  
2 F.3d 1122, 1127 (9th Cir. 2000) (en banc); *Lacey v. Maricopa Cty.*, 693 F.3d 896,  
3 926 (9th Cir. 2012) (en banc).

4 After fully considering Plaintiffs’ Complaint, the Court finds that Plaintiffs  
5 cannot prevail and it would be futile to give them an opportunity to amend. Mr.  
6 Tonnemacher does not have standing and Kathleen Tonnemacher is legally  
7 incapacitated. Any claim regarding her conservator must be alleged in the state  
8 courts where her conservator was appointed. The Court then finds that there are no  
9 set of facts Plaintiffs could allege to overcome their lack of standing and  
10 incapacity. Plaintiffs’ pleading then cannot possibly be cured by other facts and  
11 the Court dismisses Plaintiffs’ claims without leave to amend.

## 12 **II. Plaintiffs’ Second Request**

13 Plaintiffs clarify that they are not asking for summary judgment, but  
14 Kathleen Tonnemacher’s “sole interest is to get her money returned to her.” ECF  
15 No. 20 at 1. Plaintiffs request the Court hold an open public hearing and consider  
16 the issue of temporarily protecting Kathleen Tonnemacher’s assets. *Id.* Plaintiffs  
17 also request the Court rule that Ms. Ossman provide Kathleen Tonnemacher with  
18 the funds to hire a lawyer to represent her. *Id.*

19 Prudential responds that the motion was not served by Plaintiff on  
20 Prudential, but it only received notice through the filing of the document by the

1 Clerk's office on July 27, 2018. ECF No. 21 at 1-2. Prudential objects to the  
2 Motion because it was only signed by Mr. Tonnemacher and appears to make  
3 unsupported statements on behalf of Kathleen Tonnemacher. *Id.* at 2. Prudential  
4 states that to the extent Plaintiffs are seeking injunctive relief, Plaintiffs are  
5 required to have noted the hearing for at least 50 days after filing as a dispositive  
6 motion. *Id.* Prudential insists that “[t]hese motions are designed to harass and  
7 burden the Defendants and frustrate the Court’s resolution of the case.” *Id.* at 3.

8 The Court finds that Plaintiffs' second request to protect Kathleen  
9 Tonnemacher's assets is moot, as Plaintiffs' claims are dismissed. The Court also  
10 notes that Kathleen Tonnemacher likely did not take part in this motion and Mr.  
11 Tonnemacher does not have standing to assert claims on behalf of Kathleen  
12 Tonnemacher. The Court does not address Plaintiffs' arguments, which are a mere  
13 recitation of their first request that the Court previously resolved. ECF Nos. 16; 20  
14 at 2-4. Accordingly, the Court denies Plaintiffs' second request as moot.

15 **ACCORDINGLY, IT IS HEREBY ORDERED:**

16 1. Defendant Prudential's Motion to Dismiss (ECF No. 17) is **GRANTED**.  
17 2. Defendant Ossman's Motion to Dismiss and Joinder in Prudential's  
18 Motion to Dismiss (ECF No. 19) is **GRANTED**.

19 //  
20 //

1           3. Plaintiffs' Status Report and Legal Objection to Defendant Report:  
2           Motion to have this Court Temporarily Protect Kathleen's Assets (ECF  
3           No. 20) is **DENIED as moot**.

4           4. The claims asserted in Plaintiff's Complaint (ECF No. 1 (Ex. A)) are  
5           **DISMISSED WITHOUT LEAVE TO AMEND in federal court**.

6           The District Court Executive is directed to enter this Order, enter  
7           **JUDGMENT** for Defendants, furnish copies to the parties, and **CLOSE** the file.

8           **DATED** August 10, 2018.



9           A handwritten signature in blue ink that reads "Thomas O. Rice".  
10           THOMAS O. RICE  
11           Chief United States District Judge